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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CR206Mar14/OTH214Feb15

In the matter between:

PIONEER FISHING (PTY) LTD	Applicant
And	
COMPETITION COMMISSION	Respondent
In re the referral proceedings between –	
COMPETITION COMMISSION	Applicant
And	
PIONEER FISHING (PTY) LTD	First Respondent
BLUE CONTINENT PRODUCTS (PTY) LTD	Second Respondent

Panel	: N Manoim (Presiding Member) : A Wessels (Tribunal Member) : M Mokuena (Tribunal Member)
Heard on	: 28 July 2015
Reasons Issued on	: 31 August 2015

Decision in Interlocutory Application and Reasons

Application

[1] On 28 July 2015 the Competition Tribunal ("Tribunal") heard an interlocutory application by Pioneer Fishing (Pty) Ltd ("Pioneer Fishing") seeking the following orders:

[1.1] Directing the Competition Commission ("the Commission") to provide proper responses, consistent with its Complaint Referral Founding Affidavit and Initiation Statement, in respect of Pioneer Fishing's request for further particulars dated 27 August 2014, in relation to certain paragraphs of such request[1] (hereinafter referred to as "the application for further particulars").

[1.2] Striking from the Commission's response[2] to Pioneer Fishing's request for further particulars any reliance on any alleged agreement to allocate territories or markets contrary to section 4(1)(b)(ii) of the Competition Act, 1998[3] ("the Act"), other than the agreement pleaded in paragraphs 22, 23 and 24 of the Commission's Complaint Referral Founding Affidavit (hereinafter referred to as "the strike out application").

[2] This interlocutory application relates to a matter referred to the Tribunal by the Commission involving a complaint against *inter alia* Pioneer Fishing in which the Commission alleges that Pioneer Fishing contravened section 4(1)(b)(ii) of the Act by dividing markets (hereinafter referred to as "the main matter").

[3] The Commission initiated the abovementioned complaint on or about 29 March 2011. After investigating the complaint, the Commission referred the matter to the Tribunal on or about 19 March 2014. In response to the Commission's Founding Affidavit in the referral, Pioneer Fishing on 27 August 2014 requested further particulars from the Commission in order to prepare its answer. The Commission responded to the request for further particulars on 25 November 2014.

[4] After receiving the Commission's response to the request for further particulars, Pioneer Fishing brought this interlocutory application.

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[1] These paragraphs are: 1.1 (and its subparagraphs); 1.3; 3.1; 3.2; 3.3 (and its subparagraphs); and 4 (and its subparagraphs).
[2] Commission's response dated 25 November 2014.
[3] Act No. 89 of 1998, as amended.

[5] Pioneer Fishing's strike out application, which appeared to be at the heart of its interlocutory application, originates for the fact that the Commission in its response to the request for further particulars alleged that it was charging Pioneer Fishing with two different agreements – an oral agreement as well as a written restraint clause contained in a written sale agreement. The alleged oral agreement to divide markets within South Africa is expressly referred to in the Commission's Initiation Statement and referral. Pioneer Fishing however alleged that the Commission's reliance on the written restraint was a "new" complaint that went beyond what the Commission relied on in its Initiation Statement and referral.

[6] In its answering paper to the strike out application the Commission had, in the alternative, relied on the existence of a tacit initiation of the restraint contained in the written sale agreement. However, the Commission did not pursue this line of argument at the hearing and there is no reason for us to consider this further.

[7] Pioneer Fishing's application for further particulars related to a number of issues which it grouped into two broad categories: (i) markets and conduct: the intended relationship between the conduct of market division alleged and the relevant anti-trust market(s) alleged to exist; and (ii) the oral agreement: the nature of the oral agreement relied upon in the referral and its relationship with "discussions" of the agreement asserted in the further particulars.

[8] Our decision and the reasons for it follow. We shall first deal with Pioneer Fishing's strike out application and thereafter deal with its request for further particulars from the Commission for purposes of pleading in the main matter.

Strike out application

[9] As noted earlier, the strike out application originates from the fact that when the Commission provided further particulars to Pioneer Fishing at its request, it stated that it was charging Pioneer Fishing with two different agreements.

The paragraph in the Commission's response being objected to reads as follows:

> "*4.4 Ad paragraph 2*
>
> *For the sake of clarity, the Commission is relying on two agreements. The first agreement is the agreement mentioned in paragraph 22 of the Founding Affidavit to the Complaint Referral, and the second agreement is the restraint contained in the Sale Agreement referred to in paragraph 21 of the Founding Affidavit to the Complaint Referral".*[4]

[10] The first agreement referred to above by the Commission is an alleged oral agreement and the second agreement is a restraint clause contained in a written sale agreement. The strike out application relates to whether the second agreement i.e. the restraint clause in the sale agreement had been properly contemplated in the Commission's Initiation Statement and subsequently in the referral. Underlying this dispute is the issue of whether the Commission had introduced in the reply to the further particulars, a new prohibited practice, not previously contemplated in either of the former documents, because if it had, it did so at a time when that complaint would have prescribed, by virtue of the provisions of section 67(1) of the Act, which states that a complaint in respect of a prohibited practice may not be initiated more than three years after the practice had ceased.

[11] Pioneer Fishing in essence argued that it is not competent for the Commission to in an answer to a request for further particulars introduce a new complaint into an existing complaint, beyond what is relied on in the Commission's Initiation Statement and its referral to the Tribunal. As already indicated above, the alleged introduction of a new complaint by way of further particulars relates to a restraint clause contained in a written sale agreement. Pioneer Fishing's contention was that the Commission is not entitled to rely on the restraint in the sale agreement because that was not part of the complaint that it had initiated – either expressly or tacitly.

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[4] Commission's response to Pioneer Fishing's request for further particulars, see page 32 of the record.

[12] Pioneer Fishing further argued that on the face of the Commission's referral the Commission's reliance on the restraint clause in the sale agreement would have prescribed in terms of section 67(1) of the Act if it was "tacitly" initiated by the Commission at the time of responding to Pioneer Fishing's request for further particulars. Pioneer Fishing stated that on the referral allegations the conduct at issue comes to an end at 31 December 2010.[5]

[13] The Commission, on the other hand, argued that the second agreement, i.e. the restraint in the written sale agreement, is in fact relied upon in its Initiation Statement and included in its referral to the Tribunal - if read properly. Therefore the time bar issue raised by Pioneer Fishing does not arise (see paragraphs 10 and 12 above).

[14] Although the Commission in its Answer[6] to the present application stated, in the alternative to the abovementioned argument, that the existing competition case law allows it to tacitly amended its initiation, it did not pursue this line of argument at the hearing. We therefore shall not deal any further in these reasons with any alleged tacit initiation by the Commission to include the restraint.

[15] The question that we had to answer is whether or not a fair reading of the Commission's Initiation Statement - this is the key issue - and its referral to the Tribunal lead to the conclusion that the second agreement, i.e. the restraint in the written agreement, is being relied on as prohibited conduct in these documents.

[16] We first consider the Commission's initiation of the complaint.

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[5] Transcript page 16.
[6] See paragraph 15 of the Commission's Answering Affidavit, record page 73. Also see transcript pages 64 to 67.

[17] The Commission's Form CC1 dated 29 March 2011[7] initiating the complaint states: "*The parties have entered into an agreement to divide markets in the horse mackerel[8] industry in contravention of section 4(1)(b)(ii).*"[9]

[18] The Commission's Initiation Statement[10] attached to its Form CC1 states *inter alia* the following:

Under "***Background***" the Commission states:

"*DDF[11] harvests the horse mackerel through its mid water trawler the Desert Diamond. This vessel is the only dedicated trawl vessel in the horse mackerel fishery. However there are a number of firms that hold fishing rights to catch horse mackerel[12] but none own a vessel of this kind. Therefore BCP[13] has entered into a number of contractual agreements with other rights holders to catch the horse mackerel with the proviso that the fish becomes the property of BCP.*"[14]

[19] Then, under the heading "***Alleged Contraventions of the Act***", the Commission states:

"*The Commission is in possession of information which reveals an oral agreement between Oceana[15] and Pioneer[16] acting through their subsidiary companies which operate in the horse mackerel sector to divide markets by allocating customers in contravention of section 4(1)(b)(ii).*

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[7] Date stamped 30 March 2011.
[8] Horse mackerel is a species of pelagic fish found mainly along the South African and Namibian coastline.
[9] Page 64 of the record.
[10] Pages 65 and 66 of the record.
[11] Desert Diamond Fishing (Pty) Ltd ("DDF"). DDF's issued share capital is held by BCP (90%) and Sea Harvest Corporation (10%).
[12] 18 in total, according to the Commission.
[13] According to the Commission's Founding Affidavit, BCP is a subsidiary of Oceana that deals with the catching and marketing of horse mackerel and is the holder of a long-term right to undertake horse mackerel fishing in terms of the Marine Living Resources Act 1998. See page 41 of the record.
[14] Page 65 of the record.
[15] Oceana Group Limited.
[16] Pioneer Fishing (Pty) Ltd.

Saco Fishing (Pty) Ltd ("Saco"), which is the subsidiary of Pioneer in question, appointed DDF to procure the fish allocated pursuant to its horse mackerel rights. This agreement ("the catching agreement") was entered into in August 2008. In terms of the catching agreement, Saco would pay a catching fee of R3.50 per kg of horse mackerel caught to BCP.

However, unlike all of the other arrangements that DDF has with rights holders, Saco has a contractual right to buy back 20% of the fish caught under its quota each year, which it then sells on within South Africa.

As a result of this, Saco and BCP have orally agreed not to compete in the others territories in respect of the on sale of horse mackerel in South Africa. Specifically the parties agreed not to sell horse mackerel acquired from BCP into the same markets where BCP's Namibian subsidiary was selling, which were areas covering the Northern Province, Mpumalanga and the North West Province.

The Commission is of the view that the abovementioned conduct amounts to a contravention of section 4(1)(b)(ii) ...".[17]

Our assessment

[20] Before we discuss the actual Initiation Statement it is important to place this statement in its proper context in the proceedings as clarified by the Supreme Court of Appeal (SCA) in *Yara*[18].

[21] In *Yara* the SCA observed that "*the Act insists on an initiation of a complaint by the Commission as a juristic act – by way of a decision to set the process in motion – before there can be a formal investigation into that complaint.*"[19] Nevertheless the *Yara* decision makes it clear that the Commission's initiation merely sets the process in motion before there can be

[17] Record pages 65 and 66.

[18] *Competition Commission v Yara (South Africa) (Pty) Ltd and Others* [2013] 4 All SA 302 (SCA), *inter alia* paragraphs 21, 28 and 33.

[19] *Yara*, paragraph 33.

a formal investigation into a complaint, followed by a potential referral to the Tribunal. Importantly the decision makes clear in relation to the initiation that "*The Commission does not really "initiate" or start a complaint. What it does is to start a process by directing an investigation, which process may lead to the referral of that complaint to the Tribunal. And it can clearly do so on the basis of information submitted by an informant, ... ; or because of what it gathers from media reports; or because of what it discovers during the course of an investigation into a different complaint and/or against a different respondent. Since no formalities are required, Section 49(B)(1) seems to demand no more than a decision by the Commission to open a case. That decision can be informal. It can also be tacit. In argument, Counsel for Omnia informed us that, in practice, the initiation usually takes the form of a memorandum. I have no doubt that for the sake of good order and certainty, that would be so. But it is not a requirement of the Act*".[20]

[22] The Initiation Statement thus is at the very start of the Commission's investigation of a matter at which stage it does not have the full detail of the conduct that may contravene the Act. In this instance the Commission would not have had full information of what governs the alleged division of markets. The Commission's investigation would determine this and that would then be revealed in the referral.

[23] It is important not to confuse the Initiation Statement with the referral of the matter that will follow from the Commission's investigation and will particularise the findings of the Commission. We further note that the respondent does not have to respond to the Commission's Initiation Statement, but will in time be called on to answer the charge in the referral after the conclusion of the Commission's investigation into the matter. In *Yara* the SCA explains how this process works: "*the purpose of the initiating complaint is to trigger an investigation which might eventually lead to a referral. It is merely the preliminary step of a process that does not affect the respondent's rights. Conversely stated, the purpose of an initiating complaint,*

[20] *Yara*, paragraph 21.

and the investigation that follows upon it, is not to offer the suspect firm an opportunity to put its case ... Least of all is the Commission required to engage with the suspect on the question whether its suspicions are justified. The principles of administrative justice are observed in the referral and the hearing before the Tribunal. That is when the suspect firm becomes entitled to put its side of the case.[21]

[24] The level of specificity and particularity that is required of an initiating statement is thus not to be equated with that required of a referral affidavit. In *Yara* the court says that "*To demand that the referral corresponds with the contents of the complaint simply makes no sense if the complaint, as initiated, consists of nothing more than an informal decision to investigate*".[22]

[25] We now turn to the Form CC1 and Initiation Statement issued in this matter.

Form CC1 and Initiation Statement

[26] Although the Commission's Form CC1 refers to "*an agreement*" it is clear that the alleged market division in terms of section 4(1)(b)(ii) of the Act relates to more than one market in the horse mackerel industry. This Form must however be read together with the Commission's Initiation Statement attached to the Form.

[27] The Commission in its Initiation Statement sets out the facts relating to the alleged market division in a coherent fashion.

[28] After providing an introduction and some background facts, the Commission in its third heading refers to ***"Alleged Contraventions of the Act"*** – thus more than one contravention.

[29] The Commission first refers to an alleged oral agreement, which is not the subject matter of the strike out application.

[21] *Yara*, paragraph 24.
[22] *Yara*, paragraph 28.

[30] The Commission then explains how Pioneer acquired the horse mackerel that is the subject of the alleged market division: *"Saco has a contractual right to buy back 20% of the fish caught under its quota each year ..."*.

[31] The Commission further points out that this arrangement is "*unlike all of the other arrangements that DDF has with rights holders ...*". The Commission thus clearly signals that there is something different about this agreement that must be noted.

[32] The Commission then explains what Pioneer in practice did with the 20% buy back of horse mackerel from BCP and where it sold it. The Commission says that the Pioneer "*sells on*" the horse mackerel *"within South Africa"*.

[33] Thus, the Commission is signalling in the above quoted text that both the agreement itself and the geographic aspect of the sale of horse mackerel are relevant and will form part of its overall market division investigation.

[34] The Commission further goes on to state "*As a result of this ...*" the parties in question, i.e. Saco (Pioneer) and BCP "*have orally agreed*[23] *not to compete in the others territories in respect of the on sale of horse mackerel in South Africa*".

[35] There is clearly a link between the "*on sale*" of horse mackerel by Pioneer "*within South Africa*" and the alleged oral agreement to divide markets within South Africa. The Commission's use of the words "*As a result of this*" in the Initiation Statement makes this link unequivocal. The Commission's intended investigation therefore included this relationship or link as part of the *"Alleged Contraventions of the Act"*.

[36] On the face of it the written agreement limited Pioneer Fishing in that it could only sell the 20% buy back catch into the local market, in this context South Africa, or as the Commission put it in the Initiation Statement "*within South Africa*". In other words, Pioneer could not export the 20% buy back of

[23] As stated above, this oral agreement is not the subject matter of the strike out application.

horse mackerel from South Africa. The same product, i.e. the 20% buy back, was then, according to the Commission, further limited in terms of permitted sales within the borders of South Africa, i.e. the alleged division of geographical areas or territories within South Africa.

[37] We highlight that the restraint to only sell the horse mackerel within South Africa and the alleged oral agreement relate to the same product (i.e. the same 20% buy back of horse mackerel by Pioneer), involve the same parties and furthermore also relate the same type of prohibited conduct, i.e. market division in terms of section 4(1)(b)(ii) of the Act.

[38] The Commission in the last paragraph of its Initiation Statement concludes "*The Commission is of the view that the abovementioned conduct amounts to a contravention of Section 4(1)(b)(ii) of the Competition Act 89 of 1998, as amended.*" We note that the Commission does not confine itself to the oral agreement as the conduct that allegedly contravenes this section of the Act.

[39] We next consider the Commission's Founding Affidavit in the complaint referral.

Founding Affidavit in referral

[40] The Commission's Founding Affidavit in the complaint referral to a large extent tracks its Initiation Statement.

[41] In paragraph 14 of the Founding Affidavit the Commission states what it investigated as a matter of fact flowing from the complaint initiation. It says "*The Commission duly investigated the complaint and found that on or about July 2008 until 2010 the respondents agreed to divide markets by allocating territories and/or customers in respect of the market for the supply of horse mackerel into and export thereof from South Africa in contravention of 4(1)(b)(ii) of the Act*".

[42] The Commission's referral further *inter alia* sets out the various written agreements.

[43] The first written agreement that the Commission refers to in paragraph 16 of the Founding Affidavit is the "*2008 Catching Agreement*". The Commission states that on 28 August 2008 BCP and Pioneer entered into an agreement in terms of which BCP, using its vessel the Desert Diamond, would catch Saco's horse mackerel allocation for 2008 on behalf of Pioneer.[24]

[44] The Commission in paragraph 18 refers to a second written agreement i.e. "*the Sale Agreement*". The Commission states that on or about 10 September 2008 BCP and Pioneer concluded this agreement that sets out the basis upon which BCP would purchase the horse mackerel catch referred to in the 2008 Catching Agreement. The Commission further attached a copy of this agreement to the Founding Affidavit marked as annexure "*TC3*".

[45] The Commission then in paragraph 19 points out that the Sale Agreement provides that BCP will make available up to 20% of the catch to Pioneer "*on an agreed basis*".[25] This agreed basis can be read from annexure "TC3" at *inter alia* clause 3.1.2 that states "*3.1.2 BCP agrees that it shall make available to Pioneer <u>for sale in the local market</u> up to 20% of its catches of fish during the 2008 season*"[26] (own emphasis added).

[46] In paragraph 21 of the Founding Affidavit - the first paragraph of the portion headed "***Conduct In Contravention Of Sec 4(1)(b)(ii)***" - the Commission again refers to the Sale Agreement and states what portion of each catch of horse mackerel Pioneer was allowed to buy back and where it could sell this. It states "*The Sale Agreement provided that whilst BCP agreed to purchase the whole of the horse mackerel catch, it would make available 20% of each catch to Pioneer <u>for sale in the local market</u>*" (own emphasis

[24] Record page 43.
[25] Record page 44.
[26] Record page 54.

added).[27] The nature and dimensions of the restraint i.e. a 20% buy back by Pioneer that had to be sold "*in the local market*" is thus clearly referred to. We further note that the Commission uses the exact wording of the abovementioned restraint clause in the Sale Agreement when referring to the geographic aspect, i.e. "*for sale in the local market*" (see paragraph 45 above).

[47] The Commission furthermore again suggests a link between the Catching Agreement, the Sale Agreement and the oral agreement. The Commission states "*During the course of negotiating the 2008 Catching Agreement and the Sale Agreement between 2 July and 10 September 2008, BCP entered into an oral agreement with Pioneer ...*"[28] Paragraphs 22, 23 and 24 then deals further with the alleged oral agreement and the Commission's concludes in paragraph 25 that "*The above conduct*" of the respondents contravene section 4(1)(b)(ii) of the Act.[29]

[48] There is therefore a clear and unequivocal link in the Commission's referral between the written restraint and the alleged oral agreement. As stated above, these agreements relate to the same product, the same parties and the same type of conduct, i.e. an alleged contravention of section 4(1)(b)(ii) of the Act.

[49] We conclude that from a fair reading of the Commission's Initiation Statement and referral one can infer that the complaint was initiated and referred, not only in respect of the alleged oral agreement relating to the market division of specified territories within South Africa, but also in respect of the restraint relating to the 20% of the quota purchased from BCP, in terms of which Pioneer (or Saco) purchased the 20% "*for sale in the local market*". The restraint therefore is not a new complaint about a different prohibited practice not raised in the complaint.

[27] Record page 44.
[28] Page 44 of the record.
[29] Record page 45.

[50] For all of the above reasons Pioneer Fishing's strike out application is dismissed.

[51] We next turn to the application for further particulars.

Application for further particulars

[52] In its application for further particulars Pioneer Fishing in essence argued that the Commission's referral and its responses to its request for further particulars are so vague, evasive and contradictory that it prejudices Pioneer Fishing in its ability to know the case that it must meet – and the Tribunal must therefore order the Commission to provide proper responses.

[53] As stated in paragraph 7 above, Pioneer Fishing grouped its application for further particulars into two broad categories: (i) markets and conduct; and (ii) the alleged oral agreement.

[54] We first deal with Pioneer Fishing's request for further particularity on the markets in question and how they relate to the alleged market division.

(i) Markets and conduct

[55] Pioneer Fishing submitted that there is confusion about the various potential "markets" loosely referred to by the Commission in its referral.

[56] The Commission in paragraph 9 of the Founding Affidavit states that "*Pioneer supplies horse mackerel to wholesalers and distributors locally and for export markets*".[30] In paragraph 11 of the Founding Affidavit the Commission makes it clear that the respondents are in a horizontal relationship as contemplated in section 4(1) of the Act by virtue of the fact that they are in the same line of business in the market for the supply of horse mackerel. In paragraph 12 of the same Affidavit the Commission states that

[30] Page 41 of the record.

the market relevant to the referral is the market for the supply of horse mackerel into and export thereof from South Africa. The relationship between the alleged contravention, i.e. market division, and the geographic markets are then described in paragraphs 21 and 22 of the Commission's Founding Affidavit. These paragraphs have already been referred to in our above assessment of the strike out application.

[57] Given that the only conduct referred by the Commission is that of (geographic) market division of only one product (i.e. horse mackerel), and taking into consideration that the alleged market division is clearly indicated by the Commission, we found Pioneer Fishing's arguments in relation to the need for further particularity in order to plead with regards to the markets in question and how they relate to the alleged conduct of market division confusing and unpersuasive.

[58] We note that given the nature of the alleged conduct, i.e. (geographic) market division of one product (i.e. horse mackerel), this is not a complex matter as far as an understanding of the (potential geographic) markets relating to the alleged market division is concerned. All the respondent needs to know to plead to the Commission's allegations is a clear description of how the horse mackerel product market was allegedly geographically divided. As far as the geographic aspect is concerned, it is clear that the alleged market division relates to certain identified territories within South Africa, as well as an alleged prevention of arbitrage, as explained in more detail below.

[59] The first instance of alleged market division is referred to in paragraph 21 of the Founding Affidavit in the referral. This paragraph states "*The Sale Agreement provided that whilst BCP agreed to purchase the whole of the horse mackerel catch, it would make available 20% of each catch to Pioneer for sale in the local market*"[31] (own emphasis added). It is clear that in this instance the market division alleged by the Commission is that the buy back by Pioneer must be sold "*in the local market*", i.e. no arbitrage may take place.

[31] Record page 44.

In other words the buy back cannot be exported from South Africa. Pioneer Fishing can plead to this allegation.

[60] The second instance of alleged market allocation is referred to in paragraph 22 of the Founding Affidavit in the referral. The Commission alleges here that Pioneer agreed not to sell the 20% of the catch reserved for it into the same markets in South Africa where BCP and its Namibian subsidiary was selling its horse mackerel. The Commission clearly states that these markets were the "*Limpopo Province, Mpumalanga and the North West Province*". Whether these markets are "anti-trust" markets are not important for the issue of pleading. Pioneer Fishing knows exactly what the alleged division of territories or areas is within South Africa and can plead to that.

[61] The Commission's paragraphs 21 to 25 of the Founding Affidavit make it plain how the conduct of Pioneer Fishing relates to the markets.

[62] The Commission further confirmed that the alleged conduct of market division relates to potential competitors in a horizontal relationship.[32] The aim of market division normally is to prevent competition between potential competitors in a horizontal relationship. As the presiding member at the hearing put it "*the whole purpose of market division is to convert a market where you do compete to two or more markets where you no longer compete.*"[33]

[63] It was furthermore evident at the hearing that Pioneer Fishing's Counsel understood the nature of the alleged market division and areas/territories involved.[34]

[64] We conclude that the Commission has provided adequate descriptions of the (potential) markets and the alleged conduct in the Answering Affidavit in order for Pioneer Fishing to plead. There was no need for a request for further

[32] Transcript pages 72 and 73.
[33] Transcript page 72.
[34] Transcript *inter alia* page 4 (lines 16 to 21) and page 5 (lines 1 to 7).

particulars from the Commission. Pioneer Fishing's application for further particulars in relation to this is therefore dismissed.

[65] We next turn to the request for further particularity in relation to the alleged oral agreement.

(ii) Details of alleged oral agreement

[66] In relation to the alleged oral agreement, the Commission in its referral alleges a specific oral agreement concluded at a meeting between identified individuals.[35] The referral however does not state when specifically and where this meeting occurred. These particulars were sought from the Commission. Pioneer Fishing however also sought particularity as to whether it is alleged that the terms of the alleged oral agreement were expressly agreed substantially or verbatim in those terms, or, if not, which were the express and which the tacit and which the implied terms of the agreement.

Date of alleged oral agreement and individuals present

[67] Paragraph 3.1 of Pioneer Fishing's request for further particulars asked what the precise date of the oral agreement was. The Commission's response to this question was that the oral agreement was concluded in the period July to September 2008.[36] The Commission further submitted that discussions leading to the conclusion of the agreement may legitimately have taken place in a number of meetings and discussions.

[68] In relation to who was present at the meeting at which the oral agreement was allegedly concluded, the Commission provided details in paragraph 23 of the Founding Affidavit in the referral.[37]

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[35] See record pages 44 and 45.

[36] Response to further particulars paragraphs 4.4.4 and 4.5.1, record pages 32 and 33.

[37] Record page 45.

[69] In light of what is stated by the Commission in paragraphs 22 and 23 of the Founding Affidavit in the referral and the response to the request for further particulars, Pioneer Fishing is placed in a position to investigate whether the individuals mentioned attended a specific meeting during the period July to September 2008 at which the oral agreement was allegedly concluded. The particularity given by the Commission is therefore sufficient to enable Pioneer Fishing to plead to the allegation relating to a specific meeting during the period July to September 2008.

[70] However, the Commission is ordered to provide clarity on whether its case is that the oral agreement was reached at a single meeting during the period July to September 2008 or whether the agreement was reached as a result of a process. If the Commission wishes to rely not only on a single meeting but on a process, further particularity must be provided to Pioneer Fishing regarding the process.

Place where alleged oral agreement was concluded

[71] Paragraph 3.2 of Pioneer Fishing's request for further particulars asked precisely where the oral agreement was concluded. The Commission submitted that it is unable, for present purposes, to provide particularity as to the precise place where the oral agreement was concluded. Should such information however become available later, it would be set out in the Commission's witness statements.

[72] Should the above information become available, the Commission is ordered to provide this information to Pioneer Fishing as soon as is practical after it becomes available. However, the lack of this information at this stage does not prevent Pioneer Fishing from investigating the alleged oral agreement during the time period stated by the Commission and involving the individuals identified by the Commission and from pleading to the Commission's allegations.

Expressly agreed terms

[73] Paragraph 3.3 of Pioneer Fishing's request for further particulars concerns the terms of the oral agreement and whether they were expressly agreed (substantially or verbatim) in the terms worded in paragraph 22 of the Founding Affidavit in the referral or not. The Commission referred Pioneer Fishing to paragraphs 21 and 22 of the Founding Affidavit in the complaint referral, read with paragraph 23, for the relevant terms.

[74] We note that the cause of action is a complaint referral based on an agreement as defined in the Act and not based in contract in a civil law setting. In *Videx Wire Products*[38] the Competition Appeal Court (CAC) provides guidance which is of relevance to the level of specificity and particularity required in *per se* prohibitions in section 4(1)(b) of the Act. The CAC indicates that "*Prohibited conduct in the form of an overarching agreement would require there to be the requisite element of consensus ...*"[39] and then goes on to say that "*the requirement of consensus does not mean that such consensus should amount to a contract at private law. Particularly in regard to the per se prohibitions in s 4(1)(b), the parties would, by the very illicit nature of their arrangement, not contemplate legal enforcement. They need not even have agreed upon a punishment mechanism. Importantly, the court added in MacNeil that 'the content of the consensus need not... rise to the level of precision sufficient to satisfy the requirement of certainty applicable to private law contracts, ie the precision needed to defeat an argument that the alleged agreement is void for vagueness*".[40] The CAC further deals with the definition of an agreement and at the last sentence of paragraph 14 it states "*But it is recognised that evidence of collusion between the parties, evidence of price fixing or the way the understanding was reached between the parties may be inferred from circumstantial evidence ...*".

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[38] *Videx Wire Products (Pty) Ltd v Competition Commission of South Africa* (124/CACOct12) [2014] ZACAC 1 (14 March 2014).
[39] *Videx*, paragraph 13.
[40] *Videx*, paragraph 13.

[75] We conclude that it is unnecessary for the Commission for purposes of pleading by Pioneer Fishing in this matter to explain whether or not the terms pleaded in paragraph 22 of the Founding Affidavit were expressly or tacitly agreed by the individuals referred to in paragraph 23 of the Founding Affidavit – and whether substantially or verbatim. The Commission is not trying to enforce the oral agreement, but contends merely that the parties contravened section 4(1)(b)(ii) of the Act by concluding it. Pioneer Fishing's application for further particulars in relation to this is therefore dismissed since this information is not required for pleading purposes.

Duration of the alleged conduct

[76] Paragraph 24 of the Founding Affidavit alleges that the oral agreement continued for the duration of the Catching Agreement, the Sales Agreement and 2009/2010 Catching Agreement mentioned, being until the end of the 2010 season. Pioneer Fishing wanted further particulars on when the oral agreement actually came to an end.

[77] The Commission's response to paragraph 4 of the request for further particulars was that "*The agreements to allocate markets continued for as long as the Catching Agreements and Sale Agreement were in effect (namely, until the end of the 2010 season)*".[41]

[78] The Commission argued that an allegation that an agreement continued for a period of time can only reasonably mean that it remained in place and of force for that period. In other words, that the parties continued to act on the basis that the agreement remained in place and of force for that period. In our view this is sufficient particularity for pleading purposes.

[79] It is also unnecessary for the Commission to plead precisely which of Pioneer Fishing's employees acted in terms of the agreement for the period when it remained in place. The particularity is not fairly required for purposes of pleading.

[41] Record page 34.

Conclusion

[80] Save for the particulars which we have ordered be furnished, Pioneer Fishing has been given sufficient particularity to enable it to file an answer to the complaint referral.

Order

[81] The strike out application is dismissed.

[82] In relation to the application for further particulars -

[82.1] the Commission must provide Pioneer Fishing with information regarding the place where the alleged oral agreement was concluded should information become available, and if it does, as soon as is practical after it becomes available; and

[82.2] the Commission must provide clarity on whether its case is that the alleged oral agreement was reached at a single meeting during the period July to September 2008 or whether the agreement was reached as a result of a process. If the Commission wishes to rely not only on a single meeting but on a process, further particularity must be provided to Pioneer Fishing regarding the process.

[82.3] The remainder of the application for further particulars is dismissed.

[83] No order is made as to costs.

A Wessels

31 August 2015
DATE

N Manoim and M Mokuena concurring

Tribunal Researcher:	Moleboheng Moleko
For Pioneer Fishing:	Adv. Frank Snyckers SC instructed by Werksmans Attorneys
For the Commission:	Adv. NH Maenetje SC and Adv. G Badela instructed by the State Attorney